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No. 87-1187

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

—v.—

THE JUDICIAL CONFERENCE OF THE UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

**BRIEF OF RESPONDENTS THE JUDICIAL COUNCIL OF THE ELEVENTH
CIRCUIT AND HON. JOHN C. GODBOLD, CIRCUIT JUDGE,
HON. GERALD B. TJOFLET, CIRCUIT JUDGE, HON. FRANK M.
JOHNSON, JR., CIRCUIT JUDGE, HON. SAM C. POINTER, JR.,
DISTRICT JUDGE AND HON. WILLIAM C. O'KELLEY, DISTRICT JUDGE
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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Judge, Hon. Gerald B. Tjoflet, Circuit Judge,
Hon. Frank M. Johnson, Jr., Circuit Judge,
Hon. Sam C. Pointer, Jr., District Judge, and
Hon. William C. O'Kelley, District Judge*

QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, Judge Hastings is entitled to a review of his broad claims as to the constitutionality of the investigatory process of the Judicial Councils' Reform and Judicial Conduct and Disability Act of 1980 (the "Act") in light of the fact that certain of his claims have already been litigated and decided finally against him in prior litigation.
2. Whether Judge Hastings is entitled to a review of his claim that the Act conflicts with the Compensation clause of the Constitution in light of the Court of Appeals' ruling that Judge Hastings failed to exhaust his administrative remedies.
3. Whether the Act's provision which states that the Judicial Conference "shall certify its determination that a judge appointed to hold office during good behavior has engaged in conduct which might constitute one or more grounds for impeachment" violates the principles of separation of powers.
4. Whether Judge Hastings' claim that the Act conflicts with the Due Process clause of the Constitution is without merit.

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**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Respondents, the Judicial Council of the Eleventh Circuit; the Honorable John C. Godbold; the Honorable Gerald Bard Tjoflat, and the Honorable Frank M. Johnson, Jr., Circuit Judges; the Honorable Sam C. Pointer and the Honorable William C. O'Kelley, District Judges, respectfully advise the Court that they do not oppose Supreme Court review of constitutional issues properly presented for decision. Issues that are not sufficiently concrete for Article III, that are premature or precluded, are not properly presented. In his Petition Judge Hastings has presented numerous issues for review. Certain of these issues are either insufficiently concrete or premature. Other issues have been litigated in other cases, finally decided, and therefore are precluded. As to other constitutional issues, these respon-

dents do not oppose review. The Court of Appeals' opinion is reported in *Hastings v. Judicial Conference of the United States*, 829 F.2d 91 (D.C. Cir. 1987), *aff'g and rev'g* 657 F. Supp. 672 (D.D.C. 1986) ("*Hastings v. Judicial Conference II*").

STATEMENT OF THE CASE

On August 25, 1986, U.S. District Judge Alcee L. Hastings brought an action in the United States District Court for the District of Columbia against the Judicial Conference of the United States (the "Judicial Conference"); the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders; the Judicial Council of the Eleventh Circuit (the "Judicial Council"); John C. Godbold, Gerald Bard Tjoflat and Frank M. Johnson, Jr., United States Circuit Judges, United States Court of Appeals for the Eleventh Circuit; Sam C. Pointer, Jr., Chief Judge, United States District Court for the Northern District of Alabama; and William C. O'Kelley, United States District Judge, United States District Court for the Northern District of Georgia. Judge Hastings sought a preliminary and permanent injunction prohibiting the Judicial Council and the Judicial Conference from taking any action with respect to an inquiry into his judicial behavior, that had been initiated by the then Chief Judge of the Eleventh Circuit, the Honorable John C. Godbold, acting on a complaint filed pursuant to the Act. The alleged basis of the action was that the Act was unconstitutional.

Judge Hastings' complaint alleged that on August 4, 1986, an Investigating Committee (the "Committee") constituted under the Act, consisting of the five named judges of the Eleventh Circuit, had filed its report with the Judicial Council recommending that the Council determine that Judge Hastings had, in fact, engaged in the conduct for which he had been tried and acquitted, that his defense had been fabricated to avoid conviction, and that, on the basis of this determination, the Judicial Council certify to the Judicial Conference its determination that Judge Hastings had engaged in conduct that might consti-

tute one or more grounds for impeachment. At the time of the filing of his action, Judge Hastings applied for a temporary restraining order restraining any action of the Judicial Council and the Judicial Conference until the matter was heard on the merits. On August 26, 1986, the district court (George H. Revercomb, Judge) denied Judge Hastings' motion. The court ruled that Judge Hastings had not shown a likelihood of success on the merits or demonstrated irreparable harm, and, therefore, declined to interfere with the administrative process.

On September 2, 1986, Judge Hastings filed a motion for a preliminary injunction. On September 9, 1986, the Judicial Conference, its Committee to review Circuit Council Conduct and Disability Orders, the Chief Justice of the United States, and defendant-intervenor, the United States, moved the Court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the action for failure to state a claim upon which relief may be granted.

On September 10, 1986, the Judicial Council and the five members of its Investigating Committee filed a memorandum in opposition to Judge Hastings' motion for a preliminary injunction.

On September 11, 1986, Judge Hastings filed an Affidavit in which he stated that Judge Godbold had forwarded to the Judicial Conference on September 2, 1986, a certificate that the Judicial Council had determined that (a) in an effort to avoid conviction on the charge of conspiracy to solicit and accept a bribe in exchange for a judicial act, Judge Hastings engaged in obstruction of justice in preparing for and at trial, and gave false sworn testimony; and (b) Judge Hastings, in fact, did engage in such conspiracy.

On September 12, 1986, the district court (Gerhard A. Gesell, Judge) denied the motion, holding that the claim concerning the procedure the Judicial Conference would follow in considering the Eleventh Circuit's recommendation was not ripe, and, that, with one exception, Judge Hastings' other constitutional claims were barred by virtue of the preclusion doctrine. The claim not barred was the claim that the requirement of 28 U.S.C.

§ 372(c)(7)(B) that the Judicial Conference certify to the Congress any determination it may reach warranting the consideration of impeachment was unconstitutional. The court rejected this claim as without merit on the ground that any certification by the Judicial Conference "is merely informational, nothing more, to be granted only such weight as Congress in its wisdom wishes." *Hastings v. Judicial Conference of the United States*, 657 F. Supp. 672, 675 (D.D.C. 1986).

Judge Hastings appealed. On September 15, 1987, the court of appeals held that Judge Hastings was estopped from raising his claim that the Investigating Committee and the Council violated "the separation of powers and derogate from judicial independence"; and that the certification provision of the Act only placed a discretionary duty on the Judicial Conference and thus had no effect on the separation of powers. The court of appeals also held that Judge Hastings had not exhausted his administrative remedies with respect to the Compensation Clause claim; that the facial challenge to the Act on due process grounds lacked merit; and finally, that the claim alleging denial of due process in the investigation must be remanded to the district court to determine whether these objections were raised during the investigative proceedings and exhausted, and if so, to resolve them on the merits. *Hastings v. Judicial Conference II*, *supra*, 829 F.2d at 94.

STATEMENT OF FACTS

1. The Initial Complaint and the Appointment of the Committee

On December 29, 1981, Judge Hastings and William A. Borders, Jr. were charged, in a four count indictment returned by a grand jury in the Southern District of Florida, with conspiring to solicit and accept a bribe in exchange for influencing the out-

come of a case pending before Judge Hastings.¹ Borders' trial was severed and transferred to the Northern District of Georgia. On March 29, 1982, Borders was found guilty on all four counts. On December 10, 1982, the court of appeals affirmed his conviction. On February 6, 1983, Judge Hastings was acquitted by a jury in the Southern District of Florida.

On March 17, 1983, Wm. Terrell Hodges, Chief Judge of the Middle District of Florida, and Anthony A. Alaimo, Chief Judge of the Southern District of Georgia, filed a verified written complaint with the Clerk of the United States Court of Appeals for the Eleventh Circuit, pursuant to the Act, and the Rule for the Conduct of Complaint Proceedings under 28 U.S.C. § 372(c), as promulgated by the Judicial Council. The complaint alleged that Judge Hastings had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct for United States Judges, in part, because Judge Hastings had conspired with Borders to obtain a bribe in return for an official judicial act.

On March 29, 1983, Chief Judge Godbold entered an order appointing an investigating committee to investigate the facts and allegations contained in the complaint. The Committee was statutorily empowered and required to "conduct an investigation as extensive as it considers necessary, and [to] expeditiously file a comprehensive written report therein with the judicial council of the circuit." Pursuant to the Act, it was required to

1 *Count I* charged the defendants with violating 18 U.S.C. § 371 in conspiring and agreeing corruptly to ask for and to receive a sum of money for themselves in return for Judge Hastings being influenced in his performance of official acts as a United States District Judge.

Count II charged the defendants with violating 18 U.S.C. § 1503 in unlawfully, willingly, and knowingly corruptly influencing, obstructing, and impeding the due administration of justice.

Count III & Count IV charged the defendant William Borders with violating 18 U.S.C. § 1952 in unlawfully, willingly, and knowingly traveling in interstate commerce with the intent to promote, establish, carry on and facilitate unlawful activity (bribery), in violation of 18 U.S.C. § 201(c).

present to the Judicial Council both the findings of the investigation and the Committee's recommendations for necessary and appropriate action. 28 U.S.C. § 372(c)(5).

2. The Investigation Conducted by the Committee and the Challenges to its Authority by Judge Hastings

On June 3, 1983, the Committee began its investigation with the filing of a petition in the Southern District of Florida for access to the materials of the grand jury that had indicted Judge Hastings and William Borders. The Committee had determined that it needed the materials in order to perform its statutory duty to make a complete and thorough investigation. The petition did not seek public disclosure of the materials.

On June 16, 1983, Judge Hastings appeared and filed in the public file of the district court an answer and certain affirmative defenses. As part of these affirmative defenses, Judge Hastings alleged that the Committee's investigation was the result of a conspiracy among judges of the Eleventh Circuit to violate his constitutional rights. He attached as part of an appendix a copy of the complaint against him which had led to the appointment of the Committee and which theretofore had been confidential. Only the fact that a complaint had been filed, and a committee appointed, had been theretofore disclosed by Judge Godbold.

All of the district judges for the Southern District of Florida recused themselves from presiding over the matter. Judge Eugene A. Gordon, Senior Judge of the United States District Court for the Middle District of North Carolina, was specially designated to sit as a judge of the Southern District of Florida to hear the matter.

On December 19, 1983, the district court entered an order granting the petition and allowing the Committee access to the grand jury materials. *In re Petition to Inspect and Copy Grand Jury Materials*, 576 F. Supp. 1275 (S.D. Fla. 1983). On December 29, 1983, Judge Hastings filed a Notice of Appeal. On February 3, 1984, a special panel of the court of appeals stayed the

district court's order and expedited the appeal. On June 30, 1984, the court of appeals affirmed the district court's order granting the Committee's petition. *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984) ("*In re Petition*"). The court of appeals supported the district court's analysis in the special circumstances of a judicial investigation under § 372(c) of the Act.

The court of appeals also ruled that Judge Hastings' affirmative defense of a conspiracy among the judges of the Eleventh Circuit was not cognizable in the courts because the Act (§ 372(c)(10)) precluded judicial review of claims challenging the procedures that are used in any given investigation. *In re Petition, supra*, 735 F.2d at 1275.

On August 24, 1984, Judge Hastings petitioned the Supreme Court for a writ of certiorari. On October 9, 1984, Judge Hastings' petition was denied. *Hastings v. Investigating Committee*, 105 S. Ct. 254 (1984). On October 16, 1984, Judge Hastings petitioned for a rehearing. On November 5, 1984, the Supreme Court denied the petition for rehearing.

On December 23, 1983, Judge Hastings brought an action in the United States District Court for the District of Columbia, challenging the constitutionality of the Act and the Investigative Committee's authority to conduct its investigation. Judge Hastings' complaint contained four counts. The first alleged that the Act was unconstitutional on separation of powers and due process grounds. Count Two alleged that the application of the Act to him violated his due process rights. Count Three alleged that the Committee's investigation of Judge Hastings was the result of a conspiracy among judges of the Eleventh Circuit to violate his constitutional rights. The final count claimed that Judge Hastings' rights under the Privacy Act of 1974, 5 U.S.C. § 552a (1982), have been violated in connection with the investigation. The district court, the Honorable Gerhard A. Gesell, first rejected the claim of the United States that the only issue ripe for review was whether it was constitutional for judges to investigate judges for conduct alleged to be prejudicial to the effective and expeditious administration of the business of the

courts and held that it had the power to review the constitutionality of the Act itself.

Judge Gesell found that the Act represented a legitimate exercise of Congress' "necessary and proper" power by which Congress gave the judiciary reasonable means to put its own house in order. The district court rejected various challenges to the Act's constitutionality asserted by Judge Hastings, including the following: that the Act's provision for recommending impeachment to the House of Representatives impinged on the exclusive power of Congress over impeachment; that because impeachment is the sole means of removing an Article III judge from office, other forms of discipline short of removing a judge from office are foreclosed; that the Act is unconstitutionally vague and violates due process; and, that the Act impermissibly combines investigative and adjudicatory power, so as to render impossible a fair adjudication. *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (D.D.C. 1984).

As for Judge Hastings' particular concerns with Judge Godbold's composition of the Committee and its motives for its investigation, the district court held that these were not judicially reviewable and required Judge Hastings to follow the administrative review process established in 28 U.S.C. § 372(c)(10).

Judge Hastings appealed the district court's decision. On August 13, 1985, the United States Court of Appeals for the District of Columbia Circuit held that at the time the district court rendered its decision, adjudication of the constitutional issues was premature. *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), *vacating and remanding* 593 F. Supp. 1371 (D.D.C. 1984), *cert. denied*, 106 S. Ct. 3272 (1986) ("*Hastings v. Judicial Conference I*").

The court of appeals affirmed the dismissal of Judge Hastings' conspiracy claim on the grounds that the Court of Appeals for the Eleventh Circuit, in the litigation over whether the Committee could have access to grand jury materials, *In re Petition*, *supra*, 735 F.2d at 1275, had held that the district court was not the proper forum for addressing any underlying ques-

tions of "constitutional abuse" by the Committee members and that those concerns might be raised by Judge Hastings in a challenge to the actions, if any, taken by the Judicial Council by petition under § 372(c)(10) to the Judicial Conference for review of that action. *Hastings v. Judicial Conference I, supra*, 770 F.2d at 1103.

3. Proceedings Before the Committee

On April 2, 1985, Chief Judge Godbold notified Judge Hastings that the Committee would conduct proceedings in the matter of the complaints² filed against him, convening on May 20, 1985 in Atlanta, Georgia. Chief Judge Godbold also advised Judge Hastings as to the details of how the proceedings would be conducted and of his right to subpoena witnesses.

On May 16, 1985, Judge Hastings, through his counsel, Terence J. Anderson, filed a special and limited appearance before the Committee for the sole purpose of restating Judge Hastings' constitutional objection to the Committee's jurisdiction to take actions and to conduct proceedings to investigate his conduct in office. Judge Hastings advised the Committee that he believed the Act was unconstitutional and that the Committee had been acting improperly and without jurisdiction since its appointment and would be acting without authority in any proceedings it conducted on May 20, 1985, or thereafter. Judge Hastings advised the Committee that on the basis of this belief, neither he nor his counsel would appear at or participate in the proceedings.

A number of witnesses were subpoenaed to appear before the Committee at the proceedings which commenced on May 20, 1985. Certain witnesses declined to appear or, in some cases, appeared but declined to answer certain questions about events

² A second complaint involving Judge Hastings was filed under the Act on September 26, 1984. By order of December 5, 1984, Chief Judge Godbold, acting pursuant to 28 U.S.C. § 372(c)(4), referred this second complaint to the Investigating Committee.

within Judge Hastings' chambers. Betty Ann Williams, Judge Hastings' secretary, was subpoenaed to appear and bring with her certain specified records maintained in Judge Hastings' chambers. She declined to appear. Several of Judge Hastings' present or former law clerks were subpoenaed to appear and give testimony. One clerk, Alan Ehrlich, declined to appear. Two other clerks, Jeffrey Miller and Daniel Simons, appeared but refused to answer any questions about what occurred in Judge Hastings' chambers while they were employed as law clerks.

With respect to these recalcitrant witnesses, the Committee filed motions with the court of appeals to compel their testimony. Judge Hastings and the witnesses opposed the motions.

On May 20, 1985, Betty Ann Williams and Alan Ehrlich, as members of the official staff of Judge Hastings, and Judge Hastings filed a complaint in the United States District Court for the Southern District of Florida seeking injunctive and other relief. The complaint named as defendants Spencer Mercer, the Clerk of the Eleventh Circuit, and the five judges who were members of the Committee. The plaintiffs sought to challenge the validity and enforceability of the subpoenas issued under the seal of the Court of Appeals for the Eleventh Circuit at the request of the Committee. The plaintiffs moved for preliminary injunctive relief, and the defendant members of the Committee moved to dismiss the complaint for want of subject matter jurisdiction.

On May 24, 1985, a hearing was held on the pending motions before United States District Judge William W. Wilkins, Jr. of the District of South Carolina, sitting by special designation. Following the hearing, Judge Wilkins filed a Memorandum Opinion in which he concluded that the district court lacked jurisdiction over subpoenas issued by the court of appeals and ordered the dismissal of the action. *Williams v. Mercer*, 610 F. Supp. 169, 170 (S.D. Fla. 1985). In the alternative, Judge Wilkins also considered the substance of the plaintiffs' claims and found the claims to be "without merit" because the subpoenas "are . . . valid and enforceable." *Id.* at 170-171. Ac-

cordingly, Judge Wilkins ordered dismissal of plaintiffs' complaint. The plaintiffs appealed.

The Committee's pending motions to enforce its subpoenas (before the Eleventh Circuit Court of Appeals) and Judge Hastings' appeal from the district court's dismissal of his claims were set for oral argument on June 17, 1985, before the same panel of court of appeals judges which heard the appeal concerning access to the grand jury materials. On September 5, 1985, the panel directed the parties to file supplemental briefs on certain specific issues. The issues were the following:

(1) In light of the recent opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings v. Judicial Conference*, No. 84-5576 (Aug. 13, 1985) [*Hastings v. Judicial Conference I, supra*, 770 F.2d 1093 (D.C. Cir. 1985)], the nature and scope of the constitutional issues the court would need to determine before it could enforce the Committee's subpoenas to the witnesses in the instant case;

(2) In light of the opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings, supra*, at p. 18 [770 F.2d at 1102], whether it has now become more appropriate for this court to reach the constitutional issues, and if so, what constitutional issues this court should address at this time;

(3) Whether this court should decline to address the constitutional issues for reasons stated in the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *Hastings, supra*, [770 F.2d at 1103] (e.g., remoteness), and if so, what constitutional issues this court should not address at this time.

4. The Decision of the Court of Appeals of the Eleventh Circuit Acting Through a Panel Designated by the Chief Justice

On February 20, 1986, the Court of Appeals for the Eleventh Circuit issued an opinion holding that: (1) it had exclusive original jurisdiction to determine motions to enforce or quash the

subpoenas issued under its seal pursuant to the Act; (2) the Committee's statutory authority to conduct an investigation and subpoena witnesses did not violate separation of powers principles or unconstitutionally intrude upon the independence of an Article III judge; (3) the constitutional and technical objections to the Committee's issuance and service of subpoenas either were beyond the court's jurisdiction, could not properly be decided in the present proceedings, or lacked merit; and (4) the subpoenas were enforceable despite invocation of a privilege protecting communications among Judge Hastings and his staff. *In the Matter of Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir. 1986), *aff'g in part and rev'g in part on other grounds Williams v. Mercer*, 610 F. Supp. 169 (S.D. Fla. 1985), *cert. denied sub nom. Hastings v. Godbold*, 106 S. Ct. 3273 (1986) ("*In the Matter of Certain Complaints*").

In its opinion, the court of appeals pointed out that it was not powerless to protect the integrity of its process, and that the Act's goals of maintaining public confidence in the judiciary and promoting the effective administration of justice require that investigations into alleged judicial misconduct be concluded as expeditiously as is reasonably possible, lest a sitting Article III judge be compelled to function under a cloud of doubt and suspicion for any longer than is absolutely necessary. *Id.*, 783 F.2d at 1498.

As to the existence and investigative authority of the Committee, the court of appeals held that the Act did not impermissibly assign executive power, including the subpoena power, to judicial officers because the judiciary's ability to administer the business of the courts has been firmly established and is little doubted, and the Committee was concerned solely with matters affecting the management, reputation and integrity of the judiciary itself. The court relied on the Supreme Court's decision in *Chandler v. Judicial Council*, 398 U.S. 74, 86 n.7, 90 S. Ct. 1648, 1654 n.7 (1970), which recognized the judicial council's ability, as an administrative body, to make "all necessary or-

ders for the effective and expeditious administration of the business of the courts” *In the Matter of Certain Complaints, supra*, 783 F.2d at 1504-05.

The court of appeals also held that the Committee’s authority to conduct an investigation did not unconstitutionally intrude upon the independence of a sitting Article III judge. The court of appeals again relied heavily on the *Chandler* case which approved of the judiciary’s ability to “put its own house in order” and take reasonable measures to administer the courts. The court concluded that the complaint procedure established by the Act and the mechanism for investigating such complaints was reasonable and not overly threatening to judicial independence. *In the Matter of Certain Complaints, supra*, 783 F.2d at 1507.

The court of appeals also addressed various remedial measures that the Committee might recommend and the judicial council could possibly adopt, including a certification that grounds for impeachment might exist. After careful consideration, the court upheld the constitutionality of such certification, finding that it would not “chill” a judge’s independence any more than the existence of the impeachment power itself. In considering this issue, the court noted that the Constitution’s impeachment provisions do not require that the House of Representatives itself perform all preliminary investigatory functions that ultimately might inform its decision whether to impeach. Therefore, the court held that the Constitution does not detract from Congress’ powers to grant to judicial councils authority to undertake an investigation of an Article III judge with an eye to determining whether or not potential grounds for impeachment may exist:

“The House is free to act upon this information or ignore it, as it chooses. Nothing in the Act effects any change in the impeachment procedures or standards to be followed in the House.”

Id., 783 F.2d at 1511.

The court acknowledged that the prospect of impeachment is far more serious than the possibility of imposition of some of the relatively minor sanctions authorized by the Act. Arguably, the court said an investigation into conduct that might constitute one or more grounds for impeachment threatens a "more troublesome chill" of judicial independence insofar as it is directed in part at determining whether to recommend consideration of impeachment. But the Court said:

"whatever chilling effect may result from the threat of impeachment is a more or less inevitable concomitant of Congress's power to impeach. Where a complaint made against him involves matters of such seriousness, an accused judge—as was true even before the existence of the Act—will almost certainly be aware that impeachment is a possibility. The provision of an orderly, less hit-or-miss method of providing Congress with information about such a possible offense is not "unfair" to the judge. That only the House can impeach does not imply that the subject of possible impeachment can count on the absence of this further mechanism to inform Congress that a problem warranting its attention may have arisen."

Id., 783 F.2d at 1511.

5. Further Proceedings Before the Committee

The Committee held proceedings and took sworn testimony on seven different occasions: in Atlanta, Georgia, on May 20-31, 1985, and August 12-17, 1985; in Darlington, South Carolina, on September 4, 1985; in Atlanta, Georgia, on October 1-2, 1985, October 24, 1985, April 7-11, 1986, July 8-9, 1986.³ In each instance, Judge Hastings received a notice of the hearing similar to the one he received prior to the Committee's initial hearing. Judge Hastings did not participate at any of the hearings.

³ Brief proceedings were held on August 6 and 8, 1986 to complete the record of all exhibits which had been referred to at earlier proceedings.

6. Proceedings Before the Judicial Council

On August 4, 1986, Chief Judge Godbold advised Judge Hastings in a confidential notice that the Judicial Council had received the Report of the Investigating Committee and that the Judicial Council was prepared to make the Report available to him and/or his attorney for examination, subject to the confidentiality provision of 28 U.S.C. § 372(c)14.

The notice specified that the Report could be examined at the headquarters of the Eleventh Circuit in Atlanta on or before August 19, 1986. The notice also provided that the material could not be copied or removed from the premises.

On August 18, 1986, in response to the aforesaid notice, Judge Hastings filed a request for a copy of the Report and for additional time to determine whether a response would be appropriate. In his request, Judge Hastings acknowledged that he and his counsel had traveled to Atlanta to examine the Report, but he stated that he had not had enough time to decide whether a response should be filed with the Judicial Council, or for his counsel to prepare a meaningful response.

On August 20, 1986, Acting Chief Judge Paul H. Roney entered an order granting Judge Hastings until 5:00 p.m. on August 26, 1986, to file his response. The order provided that up to that time, Judge Hastings and his counsel could continue to have the right to examine the Report at the headquarters of the Eleventh Circuit. In his order, Judge Roney recited the notices which Judge Hastings had received prior to the Committee's proceedings and noted that Judge Hastings had chosen not to examine the evidence at those proceedings.

On August 25, 1986, Judge Hastings entered a Special and Limited Appearance before the Judicial Council for the sole purpose of restating and renewing his constitutional objections to the Judicial Council's jurisdiction to take action and to conduct proceedings with respect to his conduct in office.⁴ He told the Judicial Council:

⁴ On August 25, 1986, Judge Hastings brought this action in the United States District Court for the District of Columbia.

Judge Hastings believes that the Investigating Committee was constituted and acted improperly and without jurisdiction from the time of its appointment and throughout proceedings it conducted. Judge Hastings believes that the Report and record before the Council are the unconstitutional product of that improper investigation. Judge Hastings also believes that the Investigating Committee and the Council have further violated his rights in refusing to supply him with a copy of the Report and restricting the time and place for access to the Report and records compiled by the Investigating Committee.

Judge Hastings has renewed his constitutional claims challenging the constitutionality of the Judicial Council Reforms and Judicial Conduct and Disability Act of 1980 (the "Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), *codified at* 28 U.S.C. § 331, 332, 372(c), 604(h)(i) (1982), before the United States District Court for the District of Columbia. *Hastings v. Judicial Conference of the United States*, Civ. No. 86-2353 (D.D.C. filed Aug. 25, 1986) [*Hastings v. Judicial Conference II*, *supra* 829 F.2d 91 (D.C. Cir. 1987)]. That suit also joins the Council and members of the Investigating Committee as defendant and renews and supplements Judge Hastings's claims that the manner in which the Act has been implemented in the Eleventh Circuit and has been construed and applied in proceedings against him are unconstitutional.

For those reasons, except for filing this Special and Limited Appearance, neither Judge Hastings nor his counsel will otherwise appear or participate in the proceedings before the Council until such time as these constitutional claims have been finally adjudicated.

On August 29, 1986, the Judicial Council unanimously adopted a resolution accepting and approving the Report of the Investigating Committee and resolved to forward a certification to the Judicial Conference in accordance with § 372(c)(7)(B).

On September 2, 1986, the aforementioned certificate was issued by Chief Judge Godbold. On the same day, copies of the resolution and certificate were forwarded to Judge Hastings.⁵

7. Proceedings Before the Judicial Conference

On March 17, 1987, the Judicial Conference certified to the House of Representatives that "consideration of impeachment may be warranted." The certification explained:

The Judicial Conference has exercised its authority under 28 U.S.C. § 372(c)(8) to consider the certificate of the Judicial Council of the Eleventh Circuit. In so doing, the Judicial Conference had before it the certificate of the Judicial Council of the Eleventh Circuit, filed pursuant to 28 U.S.C. § 372(c)(7)(B), the report of the Investigating Committee appointed by the Chief Judge of the Eleventh Circuit pursuant to 28 U.S.C. § 372(c)(4)(A), the record and exhibits compiled by that Committee, and a Statement and Provisional and Preliminary Report prepared by counsel for Judge Hastings and filed with the Judicial Conference in response to the invitation set forth in a Resolution adopted by the Conference on September 17, 1986.

8. The Decision of the Court of Appeals, D.C. Circuit

On September 15, 1987, the United States Court of Appeals for the District of Columbia Circuit issued an opinion holding that:

a. The issue as to the powers conferred by § 372(c) on an investigating committee and a judicial council to investigate and to have subpoenas issued was precluded by the Eleventh Circuit's decision in *In the Matter of Certain Complaints, supra*. *Hastings v. Judicial Conference II, supra*, 829 F.2d at 99.

b. While *In the Matter of Certain Complaints, supra*, did not preclude reconsideration of the merits of the certification issue,

5 On September 12, 1986, the district court denied Judge Hastings' motion for a preliminary injunction, and Judge Hastings appealed. *Infra*, p. 3.

the claim was without merit. The court of appeals based its decision on a determination, on statutory interpretation grounds, that the certification provisions of § 372(c) are discretionary, not mandatory, with the consequence that the certification provision "is without substantial constitutional significance." The Court "reach[ed] this conclusion not merely to avoid a reading that might place the constitutionality of the Act in doubt, but because a fair reading of the Act supports this interpretation." *Hastings v. Judicial Conference II*, *supra*, 829 F.2d at 101-02 (footnote omitted).

c. Even if the compensation clause does require that petitioner be reimbursed the cost of his defense, "the authorities charged with administration of the Act should at least have an opportunity to construe the Act in a manner that comports with the Constitution," and they had been given no such opportunity. *Id.*, 829 F.2d at 103.

d. There was no merit to Judge Hastings' overbreadth claim because the Act is directed primarily against judicial misconduct, not against protected First Amendment activities. *Id.*, 829 F.2d at 106.

e. As to Judge Hastings' due process as applied claim, the case was remanded to the district court for further proceedings. *Id.*, 829 F.2d at 107.

RESPONDENTS' RESPONSE

1. Judicial Review Does Not Permit a Plenary Consideration, and Reconsideration in a Single Proceeding of Numerous Constitutional Issues, Some of Which are Precluded from Consideration.

While these respondents favor the review by this Court of the constitutional issues arising out of 28 U.S.C. § 372(c) that are properly presented, the public interest would not be served were this Court to disregard the principles of Article III concreteness, of preclusion, of prematurity, and of judicial review itself.

Judge Hastings seeks through this writ a plenary consideration and reconsideration in a single proceeding of numerous constitutional issues, including issues precluded from consideration and others not ripe for consideration.

Judge Hastings asserts that he is not issue-precluded by *In the Matter of Certain Complaints, supra*, from rearguing in this case "his broad claims relating to the constitutionality of the investigatory process described by the Act." *Hastings v. Judicial Conference, supra*, 829 F.2d at 100. Judge Hastings contends that there has been a "fragmented analysis" of the Act, and that this is inappropriate and has obscured the constitutionality of the Act considered as a whole. The District of Columbia Circuit rejected this argument as inconsistent with the normal process of reviewing portions of a statute that are ripe for review.

The choice of selecting constitutional issues and litigating them *seriatim* was made by Judge Hastings. He argues that he pursued his claims *seriatim*, over a period of four years, in order to present the issues to this Court on a proper record. He maintains that now that the Act has been fully implemented, and all participating entities having exercised the powers assigned to them by the Act, review of all issues at one time is appropriate. This contention, as the court of appeals noted, is "no more than an unsuccessful litigant understandably seeking a second chance." *Hastings v. Judicial Conference II, supra*, 829 F.2d at 100. Petitioner sought to prevent and to limit the investigation against him by asserting constitutional barriers. On those claims that have been adjudicated against him, he is not entitled to a reconsideration on the ground that the proceedings that he sought to frustrate have been completed.

Whether the D.C. Circuit correctly applied rules of issue preclusion is not an issue worthy of certiorari. However, if certiorari is granted, the decision of the court of appeals is clearly correct.

2. The Court of Appeals' Decision that the Judicial Conference's Certification to the House of Representatives that Impeachment May Be Warranted Does Not Render the Act Invalid.

The district court considered the merits of petitioner's claim that § 372(c)(8), which provides for certification to the House of Representatives by the Judicial Conference of a determination that an Article III judge has engaged in conduct which might constitute grounds for impeachment, is unconstitutional. The district court reached the merits despite the fact that in *In the Matter of Certain Complaints, supra*, the Eleventh Circuit had considered the same claim on the merits and had rejected it. The court of appeals affirmed the district court. This issue is open for review by this Court. These respondents do not oppose review.

3. The Court of Appeals' Decision that Judge Hastings Had Not Exhausted His Administrative Remedies Does Not Raise a Question of Federal Law that Has Not Been but Should Be Settled by the Supreme Court

Judge Hastings' compensation clause claim was denied because he had failed to exhaust the administrative remedies available to him. Judge Hastings made no request of the Judicial Council or the Judicial Conference for reimbursement of his attorney's fees, thereby denying to both of these bodies a chance to determine whether these fees were a "necessary expense incurred" by either body. The court of appeals noted that even if the compensation clause does require that petitioner be reimbursed the cost of his defense, "the authorities charged with administration of the Act should at least have an opportunity to construe the Act in a manner that comports with the Constitution." They have been given no such opportunity. *Hastings v. Judicial Conference II, supra*, 829 F.2d at 103.

4. Judge Hastings' Claim of Denial of Due Process Because the Act Is Overbroad and Vague

The court of appeals reached the merits of this claim. It rejected the overbreadth argument because the Act is directed primarily against judicial misconduct, not against protected First Amendment activities. The court held the provisions of the Act itself and the legislative history demonstrate that the Act is directed against serious judicial misconduct, not against protected speech. To the extent that some "margin" may exist for reading the Act to apply to protected First Amendment activity, the court held that this is outweighed by the legitimate and important objective of the Act. With respect to vagueness, the court held the charges against petitioner are squarely within the statutory prohibition, and Judge Hastings cannot complain of the vagueness of the law as applied to the conduct of others.

The respondents do not oppose the grant of a writ on this issue. If such a writ is granted, these respondents respectfully urge that the decision of the court of appeals be summarily affirmed.

This claim is so clearly without merit that the court of appeals should be summarily affirmed.

5. The Court of Appeals Decided that the Issue of Whether Judge Hastings Was Denied Due Process by the Investigatory Committee be Remanded for Further Proceedings. Certiorari Is Not Appropriate to Review Such a Decision.

The district court held this claim was precluded. The court of appeals reversed and remanded on this issue.⁶ Certiorari is not appropriate for such a decision.

⁶ The Court of Appeals deferred considering the issue of facial due process until after the remand.

CONCLUSION

Judge Hastings contends that the court of appeals engaged in "the manipulation of avoidance doctrine," and that its decision is founded on "unacknowledged political considerations." Judge Hastings contends that political considerations rendered the court of appeals unwilling to take the responsibility for adjudicating the validity of the Act, an Act sought by the judiciary as a political compromise. Arguments of this nature require no comment.

For the foregoing reasons, these respondents respectfully suggest that the decision of the court of appeals should be affirmed.

Dated: March 18, 1988
New York, New York

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